

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnaire.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET, 17th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-9800
FACSIMILE (803)376-2277

August 7, 2006

Mr. Charles L. A. Terreni
Chief Clerk/Administrator
South Carolina Public Service Commission
Synergy Business Park, The Saluda Building
101 Executive Center Drive
Columbia, South Carolina 29210

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SC PUBLIC SERVICE
COMMISSION

**Re: Complaint of Time Warner Cable Information Services (South Carolina),
LLC v. St. Stephen Telephone Company, Farmers Telephone
Cooperative, Inc., Home Telephone Company, Inc., PBT Telecom, Inc.
Fort Mill Telephone Company
Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and
2005-406-C**

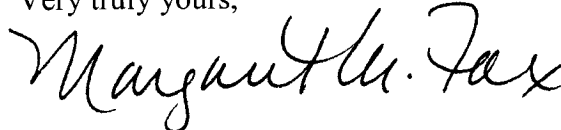
Dear Mr. Terreni:

Enclosed for filing please find an original and ten (10) copies of a Proposed Order in the above-referenced matter. By copy of this letter and Certificate of Service, all parties of record are being served by U. S. Mail with a copy of this Answer.

Please clock in a copy of this filing and return it to us by our courier.

Thank you for your assistance.

Very truly yours,



Margaret M. Fox

MMF/rwm
Enclosures

cc: Parties of Record

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COMMISSION

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C

IN RE: Docket No. 2005-402-C – Time Warner)
Cable Information Services (South Carolina))
LLC,)
Complainant/Petitioner,)
)
vs.)
)
St. Stephen Telephone Company,)
Defendant/Respondent.)
)

Docket No. 2005-403-C – Time Warner)
Cable Information Services (South Carolina))
LLC,)
Complainant/Petitioner,)
)
vs.)
)
Farmers Telephone Cooperative, Inc.)
Defendant/Respondent.)
)

IN RE: Docket No. 2005-404-C – Time Warner)
Cable Information Services (South Carolina))
LLC,)
Complainant/Petitioner,)
)
vs.)
)
Home Telephone Company, Inc.)
Defendant/Respondent.)
)

2005-406-C. These matters were consolidated by the Commission in Order No. 2006-149 in the above-referenced dockets, dated March 3, 2006, and the Commission scheduled a hearing for June 27, 2006 through June 29, 2006, to address the complaints.

By letter to the Commission dated May 26, 2006, counsel for TWCIS stated that, after consultation with counsel for respondents and counsel for the Office of Regulatory Staff (“ORS”), the parties had reached an agreement on a proposal to the Commission on how to proceed with respect to these consolidated matters. The parties asked the Commission to schedule oral arguments to address the legal issues raised by the motions, and to defer the question of any further proceedings (*i.e.*, postpone the evidentiary proceeding previously scheduled for June 27-29, 2006) until after the oral argument.

The Commission agreed to proceed in this manner, and oral arguments on the RLECs’ Motion to Dismiss and TWCIS’ Motion for Summary Disposition were held on June 28, 2006. TWCIS was represented by Frank R. Ellerbe, III, and Bonnie D. Shealy. The RLECs were represented by M. John Bowen, Jr., and Margaret M. Fox. ORS was represented by Nanette S. Edwards and Jeffrey M. Nelson.

II. FACTUAL BACKGROUND

By Commission Order No. 2004-213 in Docket No. 2003-362-C, dated May 24, 2004, TWCIS was granted a certificate of public convenience and necessity to provide service in certain areas of the State of South Carolina. The areas for which TWCIS was granted a certificate to provide service did not include any of the RLECs’ service areas. Subsequently, TWCIS requested and was denied an expanded certificate to provide service in those areas served by the RLECs. See Commission Order No. 2005-412 in Docket No. 2004-280-C, dated August 1, 2005. The Commission noted that TWCIS had changed the description of the services

for which it sought certification several times during the course of the proceeding, and denied certification due to a “failure of proof as to the original request.” See Order No. 2005-412 at pp. 5, 6.

By letters dated July 29, 2005 from TWCIS’ counsel to counsel for the RLECs, TWCIS provided notice of its intent to engage in interconnection negotiations with the RLECs. RLECs’ counsel responded by letter dated October 19, 2005, on behalf of several of the RLECs, indicating that telecommunications consultant John Staurulakis, Inc. (“JSI”) would be handling negotiations for the companies and that JSI would be preparing a proposed agreement for TWCIS’ review. On November 7, 2005, counsel for TWCIS and counsel for RLECs held a meeting primarily to discuss a similar request TWCIS had made to another carrier; however, the TWCIS/RLEC negotiations were also briefly discussed at the meeting. On December 14, 2005, counsel for TWCIS sent a follow-up letter inquiring as to the status of a proposed interconnection agreement. On December 16, 2005, Lans Chase of JSI sent a letter to Maribeth Bailey of TWCIS (“JSI Letter”),¹ stating that, after a review of the applicable state and federal rules and regulations regarding TWCIS’ request for interconnection, the RLECs were willing to continue discussions to negotiate an agreement for the exchange of traffic with TWCIS; however, the RLECs did not believe TWCIS’ request fell within Section 251 of the Telecommunications Act of 1996 (“Act”) because “TWCIS does not appear to be a telecommunications carrier in the areas of the state served by the RLECs.”

On December 28, 2005, TWCIS filed the Complaints that are at issue in these dockets, alleging the RLECs had violated 47 U.S.C. § 251(c)(1) by failing to negotiate in good faith in accordance with 47 U.S.C. § 252. RLECs answered the complaints, denying the pertinent

allegations of the TWCIS complaints. In addition, RLECs asserted TWCIS had failed to state a cause of action against RLECs upon which relief could be granted, and that Section 251 does not apply because TWCIS is not acting as a “telecommunications carrier” for the service it proposes to provide in the RLECs’ service areas. RLECs moved to dismiss the complaints on those grounds. The parties subsequently filed motions in the consolidated proceedings, as detailed above, and the Commission heard oral arguments on the motions.

III. DISCUSSION

A. RLEC Motion to Dismiss

In their Motion to Dismiss, RLECs alleged they were under no obligation to enter into negotiations under 47 U.S.C. § 251(c) and, therefore, TWCIS’ allegation of failure to negotiate in good faith pursuant to Section 251(c) should be dismissed. In the alternative, in the event the Motion to Dismiss is not granted, the RLECs asked the Commission to hold the proceedings in abeyance pending review and resolution of the IP-enabled services docket² currently before the Federal Communications Commission (“FCC”).

B. TWCIS Motion for Summary Disposition

In its Motion for Summary Disposition, TWCIS claims there are no genuine issues as to any material fact and that TWCIS is entitled to judgment as a matter of law on the issue of whether the RLECs are required to negotiate with TWCIS pursuant to the Act and in accordance with a prior ruling of the Commission. TWCIS contends the RLECs have refused to negotiate for interconnection in their service areas on several legal grounds, including on the grounds that TWCIS is not certificated in their respective service areas; that TWCIS is not a

¹ Copies of the JSI Letter are included as Exhibit 3 to the TWCIS Complaints against St. Stephen Telephone Company and Farmers Telephone Cooperative, Inc., and Exhibit 4 to the TWCIS Complaints against Home Telephone Company, PBT Telecom, Inc., and Fort Mill Telephone Company.

² Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

“telecommunications carrier” entitled to interconnection under Section 251 of the Act; and that the RLECs are not required to interconnect because of the federal rural exemption under Section 251(f)(1) of the Act. TWCIS further contends RLECs’ position directly conflicts with this Commission’s Order No. 2005-412.

TWCIS, as the complaining party, has raised two main issues that we must resolve here. First, did the RLECs refuse to negotiate in good faith pursuant to Section 251(c) of the Act? Second, are the RLECs required to negotiate with TWCIS pursuant to the Act and in accordance with this Commission’s prior rulings?

IV. FINDINGS AND CONCLUSIONS

1. We find there was no failure on the part of RLECs to negotiate in good faith. Contrary to TWCIS’ assertions, the RLECs did not “refuse” to negotiate. As stated in the JSI Letter, the RLECs were “willing to continue discussions to negotiate an agreement for the exchange of traffic with TWCIS, particularly with respect to telecommunications services that TWCIS provides in those areas where it is a certified telecommunications carrier.” Nor did RLECs base any alleged “refusal to negotiate” on the fact that TWCIS lacked a certificate to serve their respective areas, as TWCIS contends. While the RLECs did question TWCIS’ right to interconnection under Section 251, the reason given by RLECs was not that TWCIS lacked a certificate but because “TWCIS does not appear to be a telecommunications carrier in the areas of the state served by RLECs.” See JSI Letter.

2. Only telecommunications carriers are entitled to request interconnection under Section 251. See Section 251(a) (“Each telecommunications carrier has the duty . . . to interconnect . . . with the facilities and equipment *of other telecommunications carriers*”); Section 251(c) (“[E]ach incumbent local exchange carrier has . . . the duty to provide, for the

facilities and equipment of *any requesting telecommunications carrier*, interconnection with the local exchange carrier's network . . ."). "Telecommunications carrier" is defined in the Act as a "provider of telecommunications services[.]" RLECs expressed a reasonable concern regarding TWCIS' status as a telecommunications carrier and, consequently, TWCIS' right to seek interconnection for the provision of service in RLEC areas. RLECs' uncertainty is well-founded. As this Commission has previously acknowledged, the classification of Voice over Internet Protocol ("VoIP") service, which TWCIS plans to provide in RLEC areas,³ is undetermined as a matter of federal law. See Order No. 2005-484 at p. 6; Order No. 2005-544 in Docket No. 2005-67-C at p. 9 ("Whether Voice over Internet Protocol ("VoIP") will be classified as a telecommunications service or information service is currently an open question before the FCC.")⁴

3. RLECs' confusion as to the nature and characterization of TWCIS' proposed service in their areas is even more understandable in light of TWCIS' own position regarding the classification of the services it proposes to provide. As counsel for RLECs pointed out, TWCIS sent a letter to this Commission on December 14, 2005 (two days before the JSI Letter was sent to TWCIS) noting "the unsettled nature of the issues surrounding the appropriate regulatory treatment of VoIP services" and expressly stating the following:

Nothing in this letter should be construed as an admission or agreement by [TWCIS] that the Digital Phone services which it currently offers constitute telecommunications services, . . . nor that the entity or entities providing them constitute telecommunications carriers, telecommunications providers, local

³ See Hearing Transcript at p. 10, lines 8-15.

⁴ (citing Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004) ("*Vonage Order*"), fn 46 ("We do not determine the statutory classification of DigitalVoice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future.")).

exchange carrier [sic], interexchange carriers, common carriers, or other regulated entities.⁵

As counsel for TWCIS conceded, “We have been confused.” Hearing Transcript at p. 33, line 14.

4. The one thing upon which everyone seems to agree is that it is not clear whether TWCIS’ Digital Phone service is a telecommunications service and, therefore, whether TWCIS is a telecommunications carrier with respect to the provision of that service. This is true even in spite of TWCIS’ concession (with a full reservation of rights to argue otherwise) to have its Digital Phone service treated as a telecommunications service in those areas where it provides the service. As counsel for RLECs pointed out, that may be sufficient for the Commission’s purposes in those areas where the incumbent LEC did not object to such treatment, but that does not make TWCIS a telecommunications carrier in the RLEC areas with respect to these services. See Hearing Transcript at 22-23.

5. TWCIS’ reliance on isolated language in Order No. 2005-412 in Docket No. 2004-280-C is misplaced. TWCIS points to language stating that TWCIS “possesses [the] ability as a telecommunications carrier . . . to enter into negotiations with RLECs.”⁶ The language cited by TWCIS must be read in the context of the entire order, which denied a certificate to TWCIS on the basis that TWCIS had not clearly articulated the services for which it was seeking certification. As the Commission noted in its Order Denying Rehearing or Reconsideration, it was not clear exactly what authority TWCIS was seeking because “[t]here was a major discrepancy between the Application, the prefiled testimony, and the testimony provided at the hearing.” Order No. 2005-484 at p. 2. If this Commission was not even certain as to what

⁵ Letter from Frank R. Ellerbe, III, on behalf of TWCIS, to Charles Terreni, dated December 14, 2005, in Docket Nos. 2003-362-C and 2004-280-C (Tab 5 to TWCIS Motion for Summary Disposition).

⁶ TWCIS Motion for Summary Disposition at p. 7, *citing* Order No. 2005-412 at p. 6, ¶ 1.

services TWCIS sought authority to provide, we certainly could not have definitively determined the regulatory classification of those services, as TWCIS contends. Furthermore, we clarified our position in the later Order Denying Rehearing or Reconsideration, in which we stated: “TWCIS either has the right to request interconnection under Section 251 of the Act or it does not, depending on whether the services TWCIS seeks to provide are telecommunications services or not, which is an unsettled question under Federal law.” Order No. 2005-484 at p. 6. Taking these orders as a whole, it is clear that we did not make a definitive finding that TWCIS is a telecommunications carrier with respect to the provision of these services in RLEC areas.

6. RLECs’ concerns with negotiating an interconnection agreement are not “at odds” with previous PSC orders or with positions taken by RLECs, as TWCIS contends. Prior orders cited by TWCIS state that TWCIS does not need a certificate in order to request interconnection. This is a true statement, and one the RLECs do not dispute. However, the fact remains that interconnection rights have been bestowed by Congress only on requesting telecommunications carriers, as discussed above. As we stated in Order No. 2005-484, “TWCIS either has the right to request interconnection under Section 251 of the Act or it does not, depending on whether the services TWCIS seeks to provide are telecommunications services or not.” As we further noted, TWCIS does not need a certificate, nor does it need the blessing of this Commission, to *request* interconnection. See Order No. 2005-412 at p. 6; Order No. 2005-484 at p. 6. However, that does not mean it is *entitled* to interconnection.

7. Having found the RLECs have not acted in bad faith, we need not address RLECs’ motion to dismiss TWCIS’ complaints. However, we must turn to the question raised in TWCIS’ Motion for Summary Disposition regarding whether or not the RLECs are required to negotiate with TWCIS pursuant to the Act. This necessarily raises the question of whether

TWCIS' proposed service in RLEC areas is a telecommunications service that would make TWCIS a telecommunications carrier entitled to interconnection under the Act. TWCIS asserts the Commission has already made this determination. As noted above, we disagree. We also note the position of ORS that this appears to be a disputed fact that would need to be decided in an evidentiary hearing, and that no evidence has been presented on the issue in the instant proceeding. See Hearing Transcript at p. 26, lines 14-20. Thus, there appears to be a genuine issue of material fact that is disputed by the parties and that has yet to be determined. We must, therefore, deny TWCIS' Motion for Summary Disposition.

8. We must next address how to proceed from here. As counsel for RLECs argued, if we do not agree with TWCIS that TWCIS has already been found to be a telecommunications carrier with respect to the services it proposes to provide in RLEC areas, there are two ways in which we may proceed. First, we could hold an evidentiary hearing to determine the proper classification of TWCIS' Digital Phone service in RLEC areas. Second, we could hold the matter in abeyance, as urged by the RLECs in their motion, until the FCC determines the classification of IP-enabled services in its pending rulemaking proceeding. The RLECs argue the latter course of action is more prudent, noting that the FCC specifically sought comment on the impact its classification would have on the authority of states to even consider issues such as the one presented by TWCIS:

To the extent that IP-enabled services, or some subset thereof, are considered to be information services, *would state commissions have the authority to resolve interconnection or service-related disputes?* As a general matter, what role should state and local governments play with respect to these issues?

IP-Enabled Services NPRM, at para.78 (emphasis added). We agree that this matter will be settled at the federal level, and that any action we take to classify these services would be

premature. We, therefore, grant that portion of the RLECs' Motion to Dismiss that asks us to hold this issue in abeyance.

IT IS THEREFORE ORDERED THAT:

1. TWCIS' complaints alleging the RLECs have violated an obligation to negotiate in good faith are denied.
2. TWCIS' Motion for Summary Disposition is denied because there is a genuine issue of material fact to be determined in this matter.
3. We need not address those portions of the RLEC Motion to Dismiss that seek to dismiss TWCIS' complaints, because we have denied the complaints' allegations of lack of good faith on the part of RLECs.
4. We grant so much of the RLECs' Motion to Dismiss that requests we hold the issue of the classification of TWCIS' Digital Phone service in RLEC areas in abeyance until the FCC determines the classification of IP-enabled services in its pending rulemaking proceeding.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NOS. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C

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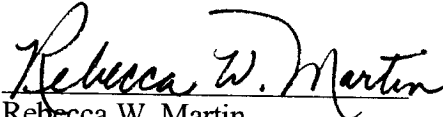
CERTIFICATE OF SERVICE

IN RE: Docket No. 2005-406-C – Time Warner)
Cable Information Services (South Carolina))
LLC,)
Complainant/Petitioner,)
vs.)
Fort Mill Telephone Company,)
Defendant/Respondent.)

I, Rebecca W. Martin, Secretary for McNair Law Firm, P. A., do hereby certify that I have this date served one (1) copy of a Proposed Order on behalf of the Defendants/Respondents in the above-referenced matter on the following parties of record by causing said copies to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below.

Frank R. Ellerbe, III, Esquire
Robinson, McFadden & Moore, P. C.
Post Office Box 944
Columbia, South Carolina 29211

Jeffrey M. Nelson, Esquire
Nanette S. Edwards, Esquire
South Carolina Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211


Rebecca W. Martin
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina
(803) 799-9800

August 7, 2006

Columbia, South Carolina